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REPORT OF THE WORKING GROUP OF STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

I. INTRODUCTION

1. At its 2393rd meeting, on 1 June 1995, the International Law Commission decided to establish a Working Group on the topic entitled "State succession and its impact on the nationality of natural and legal persons", which met in the following composition: Mr. Vaclav Mikulka (Special Rapporteur and Chairman), Mr. Awn Al-Khasawneh, Mr. Derek William Bowett, Mr. Salifou Fomba, Mr. Igor Ivanovitch Lukashuk, Mr. Robert Rosenstock and Mr. Christian Tomuschat.

2. The Working Group was entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action.

3. The Working Group held five meetings between 12 and 20 June 1995. As a result of the discussions, it agreed on a number of preliminary conclusions, which are presented in section II below.

II. PRELIMINARY CONCLUSIONS OF THE WORKING GROUP

4. The Working Group based its discussion on the fundamental premises that, in situations resulting from State succession, every person whose nationality may be affected by the change in the international status of the territory has the right to a nationality and that States have the obligation to prevent statelessness.

1. Obligation to negotiate/to resolve problems by agreement

5. The Working Group agreed that States concerned 1/ should have, first of all, the obligation to consult in order to determine whether this change had any undesirable consequences with respect to nationality. In the affirmative, States should have the obligation to negotiate in order to resolve such problems.

6. Depending on the category of State succession 2/, an agreement should thus be concluded between the predecessor State and the successor State or States - in case the predecessor State continued to exist - or between the various successor States - in case the predecessor State ceased to exist.

7. Statelessness was considered to be the most serious and undesirable potential consequence of State succession on nationality. The Working Group therefore believed that States should be under an obligation to negotiate in order to prevent statelessness. It further recommended that States also address the following potential effects of State succession during the negotiation: dual nationality; the problem of the separation of families as a result of the attribution of different nationalities to their members; and other issues, such as military obligations, pensions and other social security benefits and the right of residence.

8. The Working Group considered the effects of various types of State succession on the rights and obligations of States concerned with regard to the nationality of different categories of individuals and, as a result, formulated a number of principles which should serve as guidelines for the negotiation between States concerned.

2. Withdrawal and granting of nationality

(a) Secession and transfer of part of a State's territory

1/ "States concerned" means the predecessor State(s) and/or the successor State(s), as the case may be.

2/ The categories of State succession considered by the Working Group are the following: secession, transfer of part of a State's territory, unification - including absorption - and dissolution.

9. Secession and transfer of part of a State's territory are cases of State succession where the predecessor State continues to exist. They therefore raise the questions whether the predecessor State has the right or, in some

cases, the obligation, to withdraw its nationality from certain individuals, and whether the successor State has the obligation to grant its nationality to certain individuals.

10. The Working Group distinguished the following categories of persons:

(a) persons born in what had become the territory of the successor State;

(b) persons born in what remained as the territory of the predecessor State;

(c) persons born abroad but having acquired the nationality of the predecessor State prior to the succession by the application of the principle of jus sanguinis; and

(d) persons naturalized in the predecessor State prior to the succession.

In the case of persons who, prior to the succession, were nationals of a federal State and had been granted a secondary nationality of a component unit, the Working Group considered it useful, in addition, when appropriate, to distinguish two other categories:

(e) persons having the secondary nationality of an entity that remained part of the predecessor State; and

(f) persons having the secondary nationality of an entity that became part of a successor State.

Each of these categories was further subdivided according to the place of habitual residence of the individual concerned, namely the predecessor State, the successor State or a third State.

(i) Obligation of the predecessor State not to withdraw its nationality

11. The Working Group concluded that a number of the above categories of individuals were not affected by State succession as far as nationality was concerned. The Working Group was of the view that, in principle, the predecessor State should have the obligation not to withdraw its nationality from these categories of persons, which were the following:

(a) persons born in what remained as the territory of the predecessor State and residing either in the predecessor State or in a third State;

(b) persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of jus sanguinis and residing either in the predecessor State or in a third State;

(c) persons naturalized in the predecessor State and residing either in the predecessor State or in a third State; and

(d) persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

(ii) Right of the predecessor State to withdraw its nationality - obligation of the successor State to grant its nationality

12. The Working Group concluded that the predecessor State should be entitled to withdraw its nationality from the following categories of persons, provided that such withdrawal of nationality did not result in statelessness:

(a) persons born in what had become the territory of the successor State and residing in the successor State; and

(b) persons having the secondary nationality of an entity that became part of a successor State and residing either in the successor State or in a third State.

13. The Working Group considered that the corollary of the right of the predecessor State to withdraw its nationality should be the obligation of the successor State to grant its nationality to the above categories of persons. However, until a person had thus acquired the nationality of the successor State, the predecessor State should have the obligation not to withdraw its nationality from such persons, so that the person would not become stateless.

(iii) Obligation of the predecessor and the successor States to grant a right of option

14. The Working Group concluded that the following categories of individuals should be granted a right of option between the nationality of the predecessor State and the nationality of the successor State:

(a) persons born in what had become the territory of the successor State and residing either in the predecessor State or a third State;

(b) persons born in what had remained as the territory of the predecessor State and residing in the successor State;

(c) persons born abroad but having acquired the nationality of the predecessor State on the basis of the principle of jus sanguinis and residing in the successor State;

(d) persons naturalized in the predecessor State and residing in the successor State; and

(e) persons having the secondary nationality of an entity that became part of a successor State and residing in the predecessor State.

15. The Working Group considered that, on the one hand, the predecessor State should have the obligation not to withdraw its nationality from an individual unless he/she had opted for the nationality of the successor State and until he/she had acquired such nationality. On the other hand, in the case where an individual had opted for the nationality of the successor State, that State should have the obligation to grant its nationality to, and the predecessor State the obligation to withdraw its nationality from, such individual.

(b) Unification, including absorption

16. Unification, including absorption, is a case of State succession in which the loss of the predecessor State's nationality is an inevitable result of the disappearance of that State. Thus, the main question is whether the successor State has the obligation to grant its nationality to all individuals affected by such a loss.

17. The Working Group considered that the successor State should have the obligation to grant its nationality to the following categories of persons:

(a) nationals of a predecessor State - no matter how that nationality had been acquired - residing in the successor State; and

(b) nationals of a predecessor State residing in a third State, unless they also had the nationality of a third State. (The successor State could, however, grant its nationality to such persons subject to their agreement.)

(c) Dissolution

18. Dissolution is a case of State succession where the predecessor State ceases to exist and therefore the loss of such State's nationality is automatic. It raises, however, the question whether, and if so, to which individuals affected by the change, the successor States has the obligation to grant their nationality.

(i) Obligation of the successor States to grant their nationality

19. The Working Group concluded that each of the successor States should have the obligation to grant its nationality to the following categories of persons:

(a) persons born in what became the territory of that particular successor State and residing in that successor State or in a third State;

(b) persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of jus sanguinis and residing in the particular successor State;

(c) persons naturalized in the predecessor State and residing in the particular successor State; and

(d) persons having the secondary nationality of an entity that became part of that particular successor State and residing in that successor State or in a third State.

20. The Working Group considered that a successor State should have no obligation to grant its nationality to a person under categories (a) and (d) above who resided in a third State and also had the nationality of a third State. Moreover, a successor State should not be entitled to impose its nationality on such an individual against his/her will.

(ii) Obligation of the successor States to grant a right of option

21. The Working Group concluded that the successor States should grant a right of option to the following categories of persons:

(a) persons born in what became the territory of successor State A and residing in successor State B; and

(b) persons having the secondary nationality of an entity that became part of successor State A and residing in successor State B; and,

unless they had the nationality of a third State:

(c) persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of jus sanguinis and residing in a third State; and

(d) persons naturalized in the predecessor State and residing in a third State.

22. The Working Group considered that once the right of option had been exercised, the State for the nationality of which an individual had opted should have the obligation to grant such nationality.

3. Right of option

23. The Working Group agreed that, at this preliminary stage, the term "right of option" was used in a broad sense, covering both the possibility of "opting in" - i.e., making a positive choice - and "opting out" - i.e., renouncing a nationality acquired ex lege. The expression of the will of the individual was a consideration, which, with the development of human rights law, had become paramount. States should therefore not be able, as in the past, to attribute nationality by agreement inter se against an individual's will.

24. The Working Group stressed the fact that the States concerned should grant an effective right of option. They should therefore have the obligation to provide individuals concerned with all relevant information on the benefits and drawbacks attaching to the exercise of a particular option - including in areas

relating to the right of residence and social security benefits - so that these persons would be able to make an informed choice.

4. Other criteria applicable to the withdrawal and grant of nationality

25. The Working Group considered the question whether, in addition to the criteria mentioned under section 2 above, there were other criteria that played a role with respect to the withdrawal or granting of nationality.

26. The Working Group agreed, on the one hand, that a predecessor State should be prohibited from withdrawing its nationality on the basis of ethnic, linguistic, religious, cultural or other similar criteria, since this would amount to discrimination. Similarly, the successor State should be prohibited from refusing to grant its nationality - which it would otherwise have the obligation to grant - on the basis of such criteria.

27. The Working Group considered, on the other hand, that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including the criteria enumerated in paragraph 26 above.

5. Consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality

28. The Working Group considered the consequences of non-compliance by States with the principles set out in sections 2 to 4 above.

29. The Working Group concluded that a number of hypotheses merited further study. First, that a third State should be entitled to consider an individual as a national of a predecessor State when that State has withdrawn its nationality from such individual in violation of the above principles and the individual has become stateless as a result of such withdrawal; second, that a third State should not have the obligation to give effect to the grant by a successor State of its nationality in violation of the above principles, unless the refusal to give effect would result in treating the individual concerned as a de facto stateless person; and finally, that a third State should be entitled to consider an individual as a national of a successor State with which he has effective links when that State has failed to grant its nationality to such individual in violation of the above principles and the individual has become stateless as a result of such failure. Thus, for example, a third State would be entitled to accord to an individual the rights or status he/she would enjoy in the territory of the third State by virtue of being a national of a predecessor or a successor State, as the case may be, despite the fact that the predecessor State has withdrawn, or the successor State has refused to grant, its nationality.

30. Moreover, the Working Group agreed that further study was necessary in order to clarify the question of the international responsibility of a predecessor or a successor State for its failure to comply with the above principles, or, as the

case may be, with its obligations deriving from an international agreement with other States concerned.

6. Continuity of nationality

31. The Working Group considered the question whether the rule of continuity of nationality as a pre-condition for the exercise of diplomatic protection should apply in the context of State succession, and if so, to what extent. For this purpose, it distinguished the following three situations:

(a) ex lege change of nationality;

(b) change of nationality resulting from the exercise of the right of option between the nationalities of two successor States;

(c) change of nationality resulting from the exercise of the right of option between the nationalities of the predecessor and successor States.

32. Bearing in mind that the purpose of the rule of continuity was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group agreed that this rule should not apply when the change of nationality was the result of State succession in any of the above situations.